



## STAFF REPORT

HEARING DATE: September 4, 2013

TO: Planning Commission

STAFF: Scott Whyte, Senior Planner

PROPOSAL: **APP2013-0003** Appeal of the Director's Decision to approve Allen Estates Townhomes by Habitat for Humanity (DR2013-0043)

LOCATION: SW Sabin Street, between SW 123<sup>rd</sup> Avenue and SW 124<sup>th</sup> Avenue. Tax Lots 5700 to 8400 on Washington County Tax Assessor's Map 1S1-22BB

SUMMARY: This appeal has been filed by Henry Kane, neighboring area property owner. Primary contentions are identified herein.

APPELLANT: Henry Kane, 12077 SW Camden Lane, Beaverton, OR 97008

APPLICANT/  
PROPERTY OWNER: Willamette West Habitat for Humanity  
5293 NE Elam Young Parkway, Suite 140  
Hillsboro, OR 97124

DECISION CRITERIA: Appeal of the Director's decision is reviewed under Section 50.65 and Sections 50.80 through 50.83 of the Development Code. The Design Review 2 approval criteria are identified under Section 40.20.15.2.C of the Development Code. The Facilities Review approval criteria are identified under Section 40.03 of the Development Code.

RECOMMENDATION: **Denial of APP2013-0003 (Appeal of Director's Decision to approve Allen Estates Townhomes by Habitat for Humanity)** upholding the Director's decision, based on the facts and finding herein, thereby approving DR2013-0043 with conditions as stated in the Notice of Decision dated July 11, 2013.

## Appeal of Director's Decision for Allen Estates Townhomes by Habitat for Humanity (APP2013-0003)

### Background

On July 11, 2013, the City of Beaverton Planning Division issued a Notice of Decision for Allen Estates Townhomes by Habitat for Humanity (DR2013-0043). Page 1 of the Decision summarizes the scope of the proposal and the decision to approve subject to conditions.

On July 23, 2013, staff received the appeal application, statements and fee from Henry Kane (**Exhibit 1**). Procedures for appeal of a Type 2 decision are found in Section 50.65 of the Development Code. The Director determined the appeal to be valid under Section 50.65.2.

Allen Estates is a fully improved subdivision that contains 26 lots of record. All lots are zoned R-1 Urban High Density (R-1). The plan approved for Habitat by Humanity acknowledges townhome units to be constructed within 24 of the 26 lots. The remaining two lots (Lots 5 and 21) will be used for private open space, maintained by a homeowners association.

No change is proposed to the number of recorded lots or current lot size and dimensions. However, certain architectural changes are proposed to previously approved townhouse plan for Allen Estates (Case File DR2005-0109). The Habitat for Humanity proposal will maintain the same maximum building height as originally approved, at 40 feet with proposed buildings to be either two or three stories. Proposed design modifications generally include: building material elements, landscaping, and light fixtures. No modifications are proposed to the current street location (SW Sabin Street) or to utility connections and driveways where currently constructed or approved to be located in concert with the building plan.

Past land use case files of Allen Estates Townhomes include:

LD2005-0044 – Land Division approval for 26 lots (Planning Commission Order No. 1883)  
 DR2005-0109 – Design Review 3 approval for 26 units (Planning Commission Order No. 1884)  
 TP2005-0023 – Tree Plan 2 approval (Planning Commission Order No. 1885)  
 ADJ2005-0011 –Adjustment approval to lot depth (Planning Commission Order No. 1886)  
 ADJ2006-0013 –Adjustment denial of 20-front yard (Planning Commission Order No. 1887)  
 FS2005-0019 – Flexible Setback approval for attached (Planning Commission Order No. 1888)  
 ADJ2006-0015 –Adjustment approval of 15-foot rear yard (Commission Order No. 1889)  
 DR2007-0135 – Administrative approval of a modification to the roof pitch and other changes.

Analysis and findings provided in this report will discuss the specific criteria being appealed as identified by the appellant per Section 50.65 of the Development Code.

Pursuant to Section 50.65.4 of the Development Code, the appeal hearing shall be *de novo*, which means any new evidence and arguments can be introduced in writing, orally or both. Notice of Decision for DR2013-0042 is part of the record and is provided as an exhibit hereto (**Exhibit No. 4**). The Commission may affirm that decision, modify it or adopt its own decision based on its findings as to the relevant criteria for decision.

Decision by the Planning Commission is the City's final land use action.

**BACKGROUND****SR 2****ATTACHMENTS****A Analysis and Findings related to Appeal of the Director's Decision to DR2013-0043****A1-A6**

Analysis and Findings

A 1 - A 7

Summary

A 7

Recommendation

A 7

**EXHIBITS**

- 1 Appellant Appeal Package received on July 23, 2013, includes letters dated: July 18, 2013, July 16, 2013, July 3, 2013, June 28, 2013, June 27, 2013, June 25, 2013, June 17, 2013 May 24, 2013 and May 16, 2013
- 2 Letters from applicant's legal representative Andrew H. Stamp, P.C.
  - A. August 19 2013
  - B. July 18, 2013
- 3 Notice of Decision dated July 11, 2013
- 4 Affidavit of Mailing Notice, June 11, 2013 with property owner labels and 300-foot radius graphic
- 5 Affidavit of Posting Notice
- 6 Affidavit of Publication (Valley Times, June 13, 2013)
- 7 Planning Commission decisions for Allen Estates (described above under Background) Order Numbers 1883, 1884, 1885, 1886, 1887, 1888 and 1889
- 8 Planning Commission Minutes from May 31, 2006 and July 12, 2006
- 9 The Applicant's Plans and Materials Package, provided for Design Review 2 consideration\* includes:
  - Under Tab "Code Compliance Narrative" – Applicant's written narrative, project overview and response to applicable approval criteria and development standards.
  - Under Tab "Neighborhood Meeting" – Applicant's Neighborhood Meeting materials
  - Under Tab 2 "Prior Approval" – Past staff analysis and approved plans for Allen Estates from case files of 2006.

**\* The Planning Commission is provided the entire application package submitted for DR2013-0043, including all plans and materials.**

## ANALYSIS AND FINDINGS

### APP2013-0003 Appeal of Director's Decision

Staff responds to the appellant's contentions identified in the appeal statements as provided. The statement (including referenced to earlier letters) is dated July 18, 2013 (**Exhibit 1**). In considering the matter of appeal, Section 50.65.2 of the Development Code (Item E) instructs the appellant to identify the specific approval criteria, condition, or both being appealed, the reasons why a finding, condition, or both is in error as a matter of fact, law or both, and the evidence relied on to allege the error.

Staff has identified and summarized the appellant's statements that allege errors to have occurred. To summarize, there appear to be four primary contentions of the appellant:

- 1) Violation of due process according to City Code;
- 2) Violation of due process according to State Statutes and Administrative Rule;
- 3) Violation of the Fourteenth Amendment to the U.S. Constitution, and Article 1, Section 20 of Oregon Constitution; and
- 4) Violation of certain standards as contained in the City Development Code.

These statements are summarized below. The staff response is provided thereafter.

#### **Appellant Contention No. 1** Violation of due process according to City Code.

To this contention, staff identifies the following statements received from the appellant:

*"The Beaverton Community Development Department did not comply, inter alia, with the public hearing requirement. There was no Type Three Neighborhood Review Hearing, to the prejudice of the Vose NAC and the many homeowners residing within Vose NAC boundaries."* (Henry Kane letter dated July 18, 2013 **Exhibit 1**).

*"The original decision \*\*\* was approved through the Type 3 process, with conditions of approval. The above-quoted sentence is precedent for making the present application Type 3"* (Henry Kane letter dated July 18, 2013 **Exhibit 1**).

*"The City of Beaverton is denying opponent Henry Kane of due process of law by preventing him from submitting written testimony by 5:00 p.m. Wednesday, July 3, 2013 filing deadline, to the prejudice of opponent Kane and other neighborhood opponents."* (Henry Kane letter dated July 3, 2013 **Exhibit 1**)

*"The City's unreasonably short time to submit written testimony is arbitrary, capricious, unreasonable and abuse of discretion."* (Henry Kane letter dated July 3, 2013, **Exhibit 1**)

#### **Staff Response / Findings**

In response to the appellant's first statement (that the City did not comply with the public hearing requirement) staff refers to Section 40.20.15.2.A of the Development Code that identifies the thresholds for Design Review 2 qualification (and therefore a Type 2 process pursuant to 40.20.15.B). Threshold No. 3 of 40.20.15.2.A identifies: *New construction of attached residential dwellings excluding duplexes, in any zone where attached dwellings are a Permitted or Conditional Use.*

Allen Estates is a fully improved subdivision with all required utility connections. All lots are recorded and designed intentionally for attached residential (non-duplex). While substantial construction of the project has taken place, townhome units (via the approved plan of 2006, case file DR2005-0109) have not been constructed. Also, where *substantial construction* (definition Chapter 90) has taken place, inclusive of a land division application in this case, the City has determined the project to be vested under law. The significance of vesting status allows the applicant to proceed with construction in substantial compliance with the plans as approved. Past land use approvals remain applicable and do not expire.

In this case, the Type 2 Notice issued for Habitat for Humanity refers to the previously approved Design Review case file for Allen Estates (DR2005-0109) and generally describes proposed modifications to the previously approved plan. These modifications include building material elements, landscaping and light fixtures. Staff also identified 24 townhome units (instead of 26 as approved) and a phasing plan by Habitat where townhouse buildings would be constructed over a period of up to and including five years.

To qualify for Design Review 2, the applicant must also demonstrate compliance with all applicable Design Standards (Sections 60.05.15 through 60.05.30). The Notice of Decision issued for the Habitat proposal includes facts and findings in response to these standards, to show how the project meets all applicable standards, with conditions.

Where the appellant claims a precedent for a Type 3 process (because the original approval for Allen Estates was approved through a public hearing process), the appellant fails to identify a legal basis for such claim. In this case, the Notice of Decision issued for Habitat for Humanity has found the proposal to meet the threshold requirement for a Design Review Two application while not amending prior conditions of Planning Commission approval. The appellant fails to identify conditions of past approval that the Commission might consider under appeal.

Staff determined the scope of work proposed by Habitat to fall under Threshold No. 3 for Design Review 2 description as cited above. The appellant presents no evidence to contrary. The appellant fails provide any compelling argument as to why the project should be processed under Design Review 3 or any other Type 3 land use application that would be subject to a public hearing. Finally, the appellant's statement fails to identify or challenge any design standard as identified in the Notice of Decision. No reference or challenge is made to specific conditions of Design Review 2 approval. Therefore, staff finds the appellant's contention (as to non-compliance with the public hearing requirement under a Type 3 process) to be without merit.

Under the Type 2 process (50.30.2) a Neighborhood Meeting is not required. Therefore, the appellant's contention as to the City not applying procedures identified under Section 50.30 of the Development Code is also without merit. However, even though a Neighborhood Meeting is not required, evidence to the record shows that the applicant conducted a Neighborhood Meeting in accordance with the process as described in Chapter 50 of the City Development Code (50.30). The applicant's material package (under tab titled "Neighborhood Meeting" **Exhibit 9**) includes all information as required under Section 50.30.4. Specifically, the record shows the applicant having conducted a Neighborhood Meeting at the Beaverton Library on May 6, 2013. To a memorandum dated March 20, 2013 (also under the Neighborhood Meeting tab), the applicant claims the appellant (also the Vose NAC Chair at the time) declined a request to schedule this meeting at the regular Vose NAC's meeting date of April 18.

In response to the appellant's claim as to time provided for submitting written testimony, staff counts six letters received from the appellant prior to the end of the required 20-day notice period for the Design Review 2 process. **Exhibit 4** includes the Affidavit of Mailing Notice (with mailing list and a graphic identifying all properties located within 300 feet of the project site). The Notice was mailed by the City on June 11, 2013. The required 20-day notice period ran from June 13, 2013 to July 3, 2013. During the same period, the applicant posted Notice on-site (see Affidavit of Posting dated June 4, 2013 **Exhibit 5**). Also, notice of this project proposal was published in the Valley Times on June 13, 2013, **Exhibit 6**). Where the appellant refers to "other neighborhood opponents", staff received no other written testimony during the 20-day noticing period.

Conclusion: Staff finds the appeal statements (under Contention No.1) to be inaccurate, without sufficient specificity and without merit.

**Appellant Contention No. 2** Violation of due process according to Oregon Revised Statutes and Administrative Rules

To this contention, staff identifies the following statements received from the appellant:

*"No Oregon statute or Land Use Board of Appeals administrative rule authorizes Design Review 2." And "Design Review 2 violates ORS 197 and ORS 197.763, relating to land use."* (Henry Kane letter dated July 18, 2013 **Exhibit 1**)

**Staff Response/ Findings**

In response to contention No. 2, staff refers to and incorporates as facts and findings the statements prepared by the applicant's legal representative, Andrew H. Stamp, P.C. (**Exhibit 2**, letters dated July 18, 2013 and August 19, 2013). The statement prepared by Mr. Stamp refers to a different section of Oregon Revised Statutes (ORS), specifically ORS Section 197.015 that defines a "limited land use decision" and ORS Section 197.195 that identifies the corresponding process for limited land use decisions.

Staff concurs with Mr. Stamp, that ORS 197.763 does not apply. As stated under ORS 197.195 (2): *"A limited land use decision is not subject to the requirements of ORS 197.763."*

In addition to Mr. Stamp's letter, staff finds the City's Type 2 process to be consistent with the limited land use process as ORS 197.195 describes. That portion of ORS 197.195 related to required notice for a limited land use decision is cited below.

*ORS 197.195 (3) (b): For limited land use decisions, the local government shall provide written notice to owners of property within 100 feet of the entire contiguous site for which the application is made. The list shall be compiled from the most recent property tax assessment roll. For purposes of review, this requirement shall be deemed met when the local government can provide an affidavit or other certification that such notice was given. Notice shall also be provided to any neighborhood or community organization recognized by the governing body and whose boundaries include the site.*

In response to the above cited section, staff notes that the City's Type 2 process requires a larger area of notice (to property owners within 300 feet of the entire contiguous site) and to the Neighborhood Chair. The City's Mailing Affidavit (**Exhibit 5**) demonstrates how this has been satisfied.

Conclusion: Staff finds the appeal statements (under Contention No.2) to be inaccurate, without sufficient specificity and without merit.

**Appellant Contention No 3** Violation of the Fourteenth Amendment to the United States Constitution and Article 1, Section 20 of Oregon Constitution

To this contention, staff identifies the following statements received from the appellant:

*“Design Review Type 2 violates the Fourteen Amendment to the United States Constitution, to the prejudice of opponent Henry Kane: ...”* (Henry Kane letter dated July 18, 2013 **Exhibit 1**).

*“Section 20. Equality of privileges and immunity of citizen. No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which upon the same terms, shall not equally belong to all citizens.”* (Henry Kane letter dated July 18, 2013 **Exhibit 1**).

**Staff Response /Findings**

In response to contention No. 3, staff refers to and incorporates as facts and findings the statements prepared by the applicant’s legal representative, Andrew H. Stamp (**Exhibit 2**, letters dated July 18, 2013 and August 19, 2013). On page two of the letter dated July 18, 2013, Mr. Stamp states that Mr. Kane cites no evidence to substantiate an equal protection violation. Staff agrees and therefore finds the contention to be without merit.

Conclusion: Staff finds the appeal statements (under Contention No.3) to be without sufficient specificity and therefore without merit.

**Appellant Contention No. 4** Violation of certain standards and decision-making criteria as contained in the City Development Code.

To this contention, staff identifies the following statements received from the appellant:

*“... The back of the documents shows the location of the 26 proposed units, and the SW Sabin street that is too narrow for on-street parking. Vehicles that cannot park on Sabin will park on neighboring streets.”* (Henry Kane letter dated July 16, 2013, **Exhibit 1**)

*“Some of the 26 units will be three levels high and therefore incompatible with the neighborhood.”* (Henry Kane letter dated July 16, 2013, **Exhibit 1**)

*“Substantial discretion is required to shoe horn 26 attached housing units into 1,000 square foot R-1 lots.”* (Henry Kane letter dated June 28, 2013, **Exhibit 1**)

**Staff Response / Findings**

Because the appellant does not refer to a Code section for standards or decision-making criteria, staff is led to assume a reference to certain Code standards. For example, where the appellant refers to building height (or levels) staff responds by noting that the City R-1 zone identifies a maximum height limit of 60 feet under Section 20.05.15 of the Development Code. The applicant’s proposal is to build no higher than the previously approved development plan (to a height maximum of 40-feet). Accordingly, the Habitat proposal will not exceed the R-1 zone height

standard and maintains the same height as acknowledged under previous Design Review approval. Additionally, staff notes that all townhome units approved for Allen Estates Townhomes in 2006 were for three stories. Comparatively, the townhome proposal by Habitat for Humanity will be either two or three stories.

As previously stated, to qualify for Design Review 2, the applicant must demonstrate compliance with all applicable Design Standards (Sections 60.05.15 through 60.05.30 of the Development Code). As Section 40.20.05 of the Development Code states (first paragraph under Purpose) *These standards are intended to provide a “safe harbor” approach to designing a project. Depending on the design thresholds, designing a project to the standards would result in an administrative review process.*

The applicant decided to pursue a design option that would demonstrate compliance with all applicable design standards. Threshold No. 3 of Design Review 2 clearly corresponds with the applicant's proposal to construct attached residential in a zone where attached units are permitted outright. In this case, because the project has vesting status and complies with all past conditions of land use approval (e.g. conditions that remain applicable) staff determined that the City is legally obligated to process this application via the Type 2 process if no other land use application accompanies the proposal that would require a Type 3 process.

In this case, no other land use application accompanies the applicant's Design Review application because there is no proposal to adjust any relevant site development standard as contained in Chapters 20 or 60. Where the appellant argues that substantial discretion is required to “shoe horn” 26 attached housing units into 1,000 square foot R-1 lots, staff responds by finding the proposal consistent with applicable Development Code standards and prior approvals for Allen Estates. Additionally, staff notes that several site development standards (as contained in Chapter 20 of the City Development Code) have changed since the date of the prior approval for Allen Estates (on July 31, 2006). For example, where past approval in 2006 required an Adjustment to the R-1 Lot Depth standard (case file ADJ2006-0011) the same Adjustment application would not be required today as the Lot Depth standard for R-1 has been removed.

Similarly, where the Code in 2006 required a minimum front yard of 20 feet, the Code today requires a minimum front yard of 18.5 feet. One Adjustment application (sought by the applicant for Allen Estates in 2006) proposed reduction of the front yard standard to 18.5 feet (ADJ2005-00013). The Commission denied this Adjustment thereby requiring all units to be constructed the 20 foot Code standard (at the time). The Habitat proposal maintains the 20-foot setback as approved for Allen Estates, even though the front yard standard has since changed to 18.5 feet.

Staff notes that other setback standards have remained unchanged since 2006. For example, the R-1 rear yard setback standard of 15-feet remains the same today. Where the record shows the Commission having approved a two-foot reduction for Allen Estates in 2006 (to 13 feet approved through ADJ2006-0015, Commission Order No. 1889) the proposal by Habitat for Humanity shows adherence to the Code standard of 15-feet.

Staff finds the proposal consistent with applicable Development Code standards and prior approvals for Allen Estates. Where the prior approvals and Code conflict, the proposal by Habitat for Humanity follows the plan as approved by the Planning Commission or the Code standard if greater.



In response to the appellant's claim about the street width, staff confirms the width to be less the standard that would allow on-street parking. However, in this case, the street running through the project site is not subject to further consideration. As previously stated, Allen Estates is a fully improved subdivision. The street was constructed consistent with the plan approved under LD2005-0044 and there is no modification proposal. To date, all lots created as part of Allen Estates have been recorded as legal lots of record. All required utilities are in place and all street signage is in place, including "No Parking" signs to each side of the street. Again, the appellant does not refer a relevant Code section and does not present evidence to explain how an error of law occurred.

As for off-street parking, staff refers to the applicant's materials package that contains the prior approved plans for Allen Estates (under Tab titled "Prior Approval"). Sheet A2.30 of the prior plan approval shows how the ground floor provided a one car garage for each unit, and 20 feet of space in front of each garage to park a second vehicle. Comparatively, the townhouse proposal by Habitat for Humanity will provide the same one car garage for each unit and maintain the same front yard driveway distance of 20 feet before each garage to park a second vehicle.

The Notice of Decision issued for Habitat identifies one exception where Lot 1 will have no garage but will have one off-street parking space available. Because Lot 1 is intended for a one-bedroom unit, only one off-street parking space is required by Code. Where the original Allen Estates project had shown three-bedrooms for all 26 units, the Habitat proposal will construct a combination of one-bedroom, two-bedroom, three-bedroom and four-bedroom units. The number and location of these unit types is shown on the applicant's plans (specifically Sheet AS1).

Because the plat for Allen Estates is recorded, staff determined the off-street parking standard to apply on a lot-by-lot basis (e.g., a townhome lot intended for a three bedroom unit would need to provide a minimum of two spaces on the same lot based on the three + bedroom Code ratio of 1.75 space per unit). As stated under Section 60.30.10.A of the Development Code: *All parking spaces provided shall be on the same lot upon which the use requiring parking is located.*

While staff applied the off-street parking standard on a lot-by-lot basis, it should be noted that the Habitat plan also meets the off-street standard if the project were constructed as a condominium or apartment building. For apartments or condominiums, a different calculation can be applied to determine the required number off-street parking (which the applicant applied, in part). These calculations are shown below (comparatively, for Allen Estates in 2006 and the current Habitat proposal).

Original Allen Estate Townhomes – off-street parking under apartment calculation – 26 units:  
(26 units x 3-bedroom or higher ratio of 1.75 space/unit = 45.5). Rounded-up is **46 spaces** and approve plan identified a total of 48 off-street parking spaces.

Allen Estate Townhomes by Habitat for Humanity – under apartment calculation – 24 units:  
(7 four bedroom units x 1.75) + (13 three bedroom units x 1.75) + (2 two bedroom x 1.50) + (2 one bedroom units x 1.25) = 40.5, rounded up for total of **41 spaces** and the proposal is shown to provide a total of 47 off-street parking spaces.

All said above, there is no evidence to show how that applicant has violated any Code standard as it relates to off-street parking. Calculated either way, the applicant complies with the standard. Staff refers to the facts and findings prepared in response Criterion D of Section 40.03 (Facilities Review) as contained the Notice of Decision for additional analysis.

Conclusion: Staff finds the appeal statements (under Contention No.4) to be without sufficient specificity and therefore without merit.

### SUMMARY

For the reasons stated above, staff finds the appeal to be inaccurate and lacking sufficient specificity to merit any reversal or modification of the Director's decision to approve DR2013-0043 with conditions. Herein, staff concurs with the statements as prepared by the applicant's legal representative Andrew Stamp, with one exception. On the first page of the letter dated August 19, where the Mr. Stamps refers to Section 50.65(2)(C)&(2)(E) of the Development Code, staff notes that the decision to validate this appeal has been made by the Director and is not subject to further consideration. Staff advises the Commission to hear the appeal in accordance with procedure identified in Sections 50.80 through 50.83 of the Development Code. Also, staff reminds the Commission that the appeal hearing for Type 2 decision is *de novo*, which means any new evidence and arguments can be introduced in writing, orally or both (50.65.4).

### RECOMMENDATION

Staff recommends **denial** of **APP2013-0003 (Appeal of Director's Decision to approve Allen Estates Townhomes by Habitat for Humanity)** upholding the Director's decision, based on the facts and findings contained in this report dated August 28, thereby approving DR2013-0043 with conditions as stated in the Notice of Decision dated July 11, 2013.